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OGC 73-2360

28 December 1973

MEMORANDUM FOR: Inspector General

SUBJECT : CIA Retirement and Disability System

1. Both Larry Houston and I have spent considerable time in reviewing your proposed report on the CIA Retirement and Disability System and have reread a great deal of the legislative history. We will be the first to agree that there may well have been some errors of judgment made in administering the System and in approving participants, but we believe the Agency in practice and policy has adhered to the law and intent of Congress. Making judgments in any one case inevitably was subjective, as a reading not only of your report but the minutes of the Retirement Board will clearly demonstrate, but it is clear that many agonizing hours were spent in attempting to arrive at what were hoped to be objective decisions.

2. I would like to offer short comments on your principles described in paragraph 2 of your proposed report to the Director.

a. While the System was not as systematized as might have been, nevertheless, I think the record will show that the Board gave a considerable amount of time to this question of whether the employee was in a career making him eligible for CIARDS. It is also true that as the Board gained more experience, the record is less clear as to how these decisions were made.

b. I believe there is no requirement, implied or otherwise, that employees to be included in CIARDS must be shown to have shortened their useful service or so impaired their re-employability as to prejudice them. The basic concept was that this would happen in many cases and might happen in others.

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c. As to whether the Agency manipulated the System by, for example, sending someone abroad to gain two additional years of qualifying service, this is a function of management and command and certainly the Board could not interfere with this process and undoubtedly the Director of Personnel would have had a difficult time.

3. General Carter, in his prepared statement to open the hearings before the House Armed Services Committee, Subcommittee No. 1, on 23 July 1963, pointed out that the bill permitted the Agency to improve its retirement program by authorizing the establishment of a system corresponding to that of the Foreign Service. While never as explicitly stated as possibly should have been, inherent in the Agency's choosing the Foreign Service system was the fact that the people to whom it generally would apply would normally serve periods of service overseas just as would Foreign Service people. Inherent in our justification then was the fact that our overseas people were subjected to precisely the same conditions as the Foreign Service people, but in addition had other factors which justified different treatment than the normal Civil Service Retirement System would afford. The committees, which heard detailed justifications, did not put in any specific prohibition that service abroad alone would not be qualifying.

4. In considering the criteria for qualifying service, various approaches are possible and acceptable. One would be to take each case, study the background and detail, and say this, that, or the other criteria established consistent with the statute comprises qualifying service and, therefore, is a valid basis for admission to the System. Another approach would be to say that all overseas service for CIA by its nature must encompass one, some, or all of the criteria for qualifying service and, therefore, overseas service in itself is qualifying service. So far as we are concerned this latter position is completely consistent with the bill as reported out by our House Subcommittee which heard the justification and is not inconsistent with the bill as modified by the Rules Committee. Granted that this is probably the most liberal interpretation of the statute, we do not believe that it is demonstrably in violation of Congress, even though we might want for reasons of our own to establish a more rigid policy.

5. The first sentence of paragraph 7 charges, "the Agency has developed standards for determining qualifying service that are inconsistent with the clear intent of Congress." In this extremely complicated field, the Agency obviously has some leeway under the law as to whether it will apply every phrase literally, no matter how it renders a disservice to the total purpose of the law, or it could develop standards so loose as to defeat the intent of Congress. I cannot agree that the Agency has done the latter as is charged. I think the Agency is somewhere in the middle -- maybe as a policy matter it should be more tight or maybe it should be more loose.

6. Our retirement legislation in one sense was designed to serve two purposes. It was designed to give the Agency a manageable tool, but it was also what is characterized as beneficial legislation. The rules of construction governing beneficial legislation are to give the entire Act its full meaning and to be liberal so as to effectuate that overall purpose. As pointed out earlier, the House Committee thoroughly examined Agency justifications and did not see fit to word the Act so as to specifically prohibit overseas service standing alone as a criteria for qualifying service.

7. In addition to the above areas, in the attachment to this memorandum I have attempted to list a number of items on which I believe the IG report is either inaccurate or by incomplete statements tends to distort the situation. I believe the cumulative effect of these distortions has contributed to certain of the IG conclusions with which I cannot wholly agree.

8. I cannot disagree that it might well be desirable at this stage to have a thoroughly staffed review of the System now that we have a great deal of experience under our belt and thus are hopefully able to establish clearer and more precise standards.

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JOHN S. WARNER
Acting General Counsel

Attachment

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Original - Addressee
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1 - OGC subj: Retirement w/att
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Comments on IG Synopsis
of Development and Administration of CIARDS

1. Paragraph 14 -- It is stated the Board did not intend to ask the approval of the Armed Services Committees of Congress for revised rules. First of all, it is not up to the Board to make such a decision. The Board is advisory only to the Director of Personnel. Second, as touched on elsewhere in the IG papers, there is a question of the constitutionality of the law requiring the original approval of the regulations. This is appropriate since in fact such a requirement is not in accord with the constitutional doctrine of separation of powers. The IG report suggests elsewhere on this issue that this requirement has compromised the administrative control of the Director. I disagree with this since the practical power of our two oversight committees is such that they could require review of our regulations, whether it was in the law or not. The question of whether we should submit revisions is not settled and should be reviewed very carefully by OGC, OLC and eventually the Director.

2. I think the first sentence of paragraph 18 should state right at the beginning that the Board relaxed its policy on domestic qualifying service in mid-1968 to mid-1969 on the basis of the directive from the Executive Director-Comptroller. While this point is made in the body, I think it should be clear that the Board on its own never relaxed its policy but followed a consistent practice and judgment on following domestic qualifying service cases. The directed relaxation of criteria ended automatically with the end of the first five-year quota period on 31 June 1969. The statement that the Board relaxed its policy twice was simply erroneous since I have no knowledge of the Board on its own relaxing its policy in the Spring of 1973 or at any other time. It is stated that the Board in its later period resisted the efforts of personnel to retire under the System. To my knowledge the Board simply continued the careful examination utilizing the same criteria and precedents to assure itself that domestic qualifying cases were fully qualified.

3. Paragraph 25 -- After dealing with statistics this paragraph indicates a considerable number of people retiring at age 56 on up. The statement is then made: "The System was intended to take care of employees for whom the Agency could not provide full-term

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employment." But it is also true that the System was so legislated as to authorize full-term employment up to age 60, and if it was not so intended, the Congress could have legislated a lower mandatory retirement age. Further, these statistics by themselves are misleading since they do not include the length of service of the individuals and it is quite possible many of them at age 56 and above have less than 30 years of employment. On the other hand, it is quite possible that many from ages 50-55 had less than 30 years. Nor in these figures is there included the average length of service with the government.

Annex 1

1. Paragraph A. 3 -- OGC is quoted as stating the Senate Committee wiped "out the Foreign Service Retirement System as its basis." Those words were intended to mean it removed the Foreign Service legislative provisions in concept. But it did not remove the example of Foreign Service officers and their circumstances as a part of the justification for Agency officers who similarly served overseas. Thus, the Foreign Service example was a justification and the mere removal of certain of the legislative provisions did not remove the justification. General Carter stated in his opening statement at the House hearings: "We have determined that the Foreign Service System fulfills Agency requirements and is appropriate for those employees whose careers involve conditions of service comparable to those of Foreign Service personnel." In other words, General Carter was stating that Foreign Service people serve overseas and so do ours. The other descriptions of jobs are simply to reinforce and buttress this fundamental concept.

2. Paragraph B.1 -- It is stated: "The Agency's basic position was that it could not provide a full-term career (30 years) for certain of its employees." But nowhere does General Carter, or others, state that every employee under CIARDS would be denied a full career. It was only intended to say that many participants would not have a 30-year career. The average age of our CT'er at this point is about 26, but yet mandatory retirement for age was set at age 60.

3. Paragraph B. 7 -- The report states that we were asking for authority for about 25 percent of our people in early June and in

September. General Carter advised the Committees that there will be a maximum of about [redacted] articipants. The current figure given in the IG report is [redacted] which would indicate that our practices of granting eligibility have been very close to estimates made in 1963. 25X1

Annex 2

1. Paragraph C. 2 -- It is stated that very early after passage of the Act each "Board member was supplied with folders containing all necessary original data on the legislative hearings, bills and regulations." I think it important to note here that the Director of Personnel and the Board from the very beginning were very conscious of their responsibilities upon entering into an entirely new endeavor of administering a very special retirement law. That there was a conscientious, time-consuming struggle to administer this program pursuant to the law and the intent of Congress cannot be doubted. Similarly, that some mistakes have been made also cannot be doubted.

2. Paragraph C. 12 -- The exchange between [redacted] and Mr. Karamessines deals with the question of whether overseas service in and of itself with no other elements is automatically qualifying. The conclusion was that the Board could properly exclude such a case. It may well be then that to support an assertion that the Board has been automatically granting all overseas services as qualifying would have to be examined with some care to see that the Board, with its long experience, found other elements which warranted inclusion. 25X1

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Remarks:

Don:

We have taken a little longer time than we had hoped on this. I trust my comments will be helpful. In addition, however, Larry has had the opportunity to review what I have done and has additional comments which are also attached.

STAT

John S. Warner

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
Acting General Counsel, ext [redacted]	12/28/73

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NOTE ATTACHED TO OGC 73-2360. MEMEORANDUM FOR THE INSPECTOR GENERAL DATED 28 DECEMBER 1973.